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JOHN T. FEY, CL

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 974

UNION PAVING CO., a corporation,
Petitioner,

vs.

DOWNER CORPORATION, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the United States.

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Subject Index

Page

Opinion below 2

Jurisdiction 2

Question presented 2

Constitutional and statutory provisions involved 3

Statement of the case 5

Argument 9

I. Certiorari should be granted because the District Court of Appeal has decided a federal question of substance not heretofore determined by the United States Supreme Court and in a way not in accord with the basic requirements of due process 9

II. The due process clause exacts from the states and their courts all that is implicit in the concept of ordered liberty. And it is clear that this concept protects against arbitrary and capricious construction of a state statute and against compulsory arbitration 11

III. In protecting the right of parties to enter arbitration only by their express consent, arbitration statutes typically allow trial by jury on the issues of the making of the arbitration contract and default in the performance thereof. When demanded, such jury trial then becomes a matter of right 12

IV. Petitioner contends that it is therefore a violation of due process for a court—admittedly determined to intervene in settlement negotiations—to deny a right to trial by jury and thus deprive a litigant of the opportunity to prove to a jury that no default justifying court intervention has occurred, when that precise right is guaranteed by state statute 13

V. The opinion of the District Court of Appeal states that every intendment is in favor of the validity of an arbitration award. It then proceeds to review the evidence most favorable to Downer Corporation on the issue of default, and concludes that the trial court's

Page

finding is amply supported. But that approach ignores the fact that the right to jury trial is dependent upon the pleadings raised in defense by the responding party. Petitioner contends that its right to jury trial on issues raised cannot be defeated by the backwards process of hearing the evidence, making an adverse finding thereon, and then using a rule of appellate review to support the adverse finding and thereby rejecting the admitted contention that there was no default 16

Conclusion 18

Table of Authorities Cited

Cases	Pages
Almacenes Fernandez v. Golodetz, 148 F. 2d 625 (2d Cir.)	13
Am. R. Ex. Co. v. Kentucky, 273 U.S. 269, 71 L. Ed. 639, 47 S. Ct. 353	11
Crofoot v. Blair Holding Corp., 119 Cal. App. 2d 156, 260 P. 2d 156	14
Drake v. Stein, 116 C.A. 2d 779, 254 P. 2d 613	12
Foster v. Illinois, 332 U.S. 134, 91 L. Ed. 1955, 67 S.Ct. 1716	11
Goldstein v. International Ladies G. Workers Union, 328 Pa. 384, 196 Atl. 43	12, 13
In re Gresham & Co., 202 App. Div. 211, 195 N.Y.S. 106	13
Katakura & Co. v. Vogue Silk Hosiery Co., 307 Pa. 544, 161 Atl. 529	13
Lew Morris Demolition Co. v. George F. Driscoll Co., 273 N.Y. 330, 7 N.E. 2d 252	12
Menzet v. Nashville Paper, Etc., Un., 221 F. 2d 644	11
Pacific Vegetable Oil Corp. v. C.S.T., Ltd., 29 Cal. 2d 228, 174 P. 2d 441	14
Palko v. Connecticut, 302 U.S. 319, 82 L.Ed. 288, 58 S.Ct. 149	11
Pneucrete Corp. v. U. S. Fid. & G. Co., 7 C.A. 2d 733, 46 P. 2d 1000	15
Schafran & Finkel v. M. Lowenstein & Sons, 280 N.Y. 164, 19 N.E. 2d 1005	12
Wolf v. Colorado, 338 U.S. 25, 93 L.Ed. 1782, 69 S.Ct. 1359	11
Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 67 L.Ed. 1103, 43 S.Ct. 630	11

Constitutions

Pages

California Constitution, Article I, Section 7 3

United States Constitution, Fourteenth Amendment 2, 3

Statutes

California Code of Civil Procedure:
Section 1282 ..... 6, 10, 14, 15, 17
Section 1283 ..... 10, 15

Statutes of California, 1927, Chapter 225, Sections 3 and 4, pages 404-405 3

28 U.S.C.A. Section 1257(3) 2

Texts

12 Am. Jur., Constitutional Law, Section 577, page 274.... 11

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PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the United States.

Petitioner prays that a writ of certiorari issue to review the decision of the District Court of Appeal of the State of California, Third Appellate District, which affirmed a judgment of the Superior Court of the State of California in and for the County of Alameda.

OPINION BELOW.

The opinion of the District Court of Appeal is reported in Volume 146 Advance California Appellate Reports 765 and 304 P. 2d 756. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION.

The judgment of the District Court of Appeal was dated and entered December 11, 1956.

A petition for rehearing was denied by the District Court of Appeal by its order dated January 3, 1957.

A petition for hearing by the California Supreme Court after decision by the District Court of Appeal was denied by its order dated February 6, 1957.

The decision of the District Court of Appeal of the State of California is therefore the decision of the highest court of the State of California in which a decision could be had.

The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1257(3).

QUESTION PRESENTED.

Is a party deprived of property and compelled to arbitrate without due process of law within the prohibition of the Fourteenth Amendment when a proceeding to compel arbitration is commenced under a state arbitration statute which guarantees a jury trial on the issue of default, and the defendant properly

alleges that there has been no default under the arbitration agreement, demands a jury trial on the issue, but is denied such right of trial by jury and compelled to arbitrate?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution is involved.

The Constitution of California provides a right of trial by jury. It provides in Article I, Section 7, as follows:

> "Sec. 7. The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of both parties expressed in open court by the defendant and his counsel, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor, the jury may consist of 12, or of any number less than 12 upon which the parties may agree in open court."

The state statutes involved may be found in Chapter 225, Sections 3 and 4, pages 404-405, Statutes of California, 1927, and read as follows:

> "Sec. 3. Section 1282 of the Code of Civil Procedure is hereby amended to read as follows:
>
> "§ 1282. A party aggrieved by the failure, neglect or refusal of another to perform under an

agreement in writing providing for arbitration may petition any superior court of the county or city and county where either party resides, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of the hearing of such application shall be served personally upon the party in default. The Court shall hear the parties, and upon being satisfied that the making of the agreement or such failure to comply therewith is not in issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. *If the making of the agreement or the default be in issue an order shall be made directing a summary trial thereof. Where such an issue is raised, the party alleged to be in default, may, on or before the return day of the notice of application, demand a jury trial of such issue, and if such demand be made, said court shall make an order referring the issue or issues to a jury called and impaneled in the manner provided for the trial of actions at law.* If no jury trial be demanded said court shall hear and determine such issue. If the finding be that no agreement in writing providing for arbitration was made, or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the finding be that a written provision for arbitration was made and there is a default in proceeding thereunder, an order shall be made summarily directing the parties to proceed with the arbitration in accordance with the terms thereof." (Emphasis ours).

"Sec. 4. Section 1283 of the Code of Civil Procedure is hereby amended to read as follows:

"§ 1283. If, in the agreement, provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed, but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, or in the failure or refusal of any arbitrator or arbitrators or umpire to attend or fulfill his or their duties, then, upon application by either party to the controversy, the court mentioned in section 1282 of this code shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided, the arbitration shall be by a single arbitrator."

STATEMENT OF THE CASE.

Petitioner and respondent are parties to two almost identically worded joint venture agreements, each of which contains the following arbitration clause:

"If any question should arise concerning the interpretation of this Agreement or any matter arising therefrom, said question or matter shall be left to the determination of a Board of Arbitrators. Each party shall appoint one arbitrator and these two shall appoint a third arbitrator. The decision of any two arbitrators shall be binding upon both parties hereto, and the cost of arbi-

tration shall be borne equally between both parties."

Respondent Downer Corporation commenced these proceedings on March 13, 1952, by filing two separate petitions (Cl. Tr. 1-14, 411-424) and two separate notices of "Motion for Order Directing Arbitration to Proceed and for Appointment of a Third Arbitrator" (Cl. Tr. 15-17, 425-426). After alleging that a controversy had arisen between Downer Corporation and Union Paving Co. under both joint venture agreements, the petitions alleged that in mid-December, 1951, Downer Corporation had appointed Forrest E. Macomber as its arbitrator, that Union Paving Co. had appointed Henry C. Clausen as its arbitrator, and that the two arbitrators had *"been unable to agree on the matters sought to be arbitrated"* and had likewise been unable to agree upon the appointment of a third arbitrator. Downer Corporation asked for *an order "directing that arbitration proceed* in the manner provided for in the written agreement" and for appointment of a *"third"* arbitrator.

Section **1282** of the California Code of Civil Procedure expressly allows "a party aggrieved by the failure . . . of another to perform under an agreement in writing providing for arbitration" to "petition any superior court . . . *for an order directing that such arbitration proceed* in the manner provided for in such agreement." The code also expressly guarantees a jury trial on the issue of default if the party alleged to be in default raises such issue and

makes proper demand for a jury trial. (See italicized portions of statute previously quoted.)

Accordingly, Union Paving Company properly filed an answer *and demand for jury trial* (Cl. Tr. 25-29), alleging that while the parties had appointed Macomber and Clausen as arbitrators, the said Macomber and Clausen were actually the attorneys for the parties; that the parties had thereafter agreed to table arbitration in favor of settlement negotiations; that the two attorneys had been directed to work toward an amicable settlement of the parties' differences; that such settlement negotiations had been conducted and were in process the very day and hour these proceedings were commenced; that there had been no demand for or refusal of arbitration or the resumption thereof; that Union Paving Co. was not in default; and that there had been no failure on its part to name a "third" arbitrator or any other action which would justify court intervention. (See Appendix B.)

The superior court then actually set the matter down for jury trial on June 16, 1952 (Cl. Tr. 32, 33, 37, 38, 39). But when that day arrived the court announced that a jury trial would not be allowed (Cl. Tr. 42, R. Tr. 33, 35). Union Paving Co. renewed its demand for a jury trial and took exception to the ruling (R. Tr. 35, 37). But again, the court directed the parties to proceed with a court trial (R. Tr. 35).

Although conceding that attorneys Clausen and Macomber had been engaged in *settlement negotiations,*

the court said it felt such negotiations were merely "operation deadlock" (R. Tr. 45, 110, 116-117). The court then made an order appointing Kenneth G. McGilvray as a "third" arbitrator and directed that he, together with Forrest E. Macomber and Henry C. Clausen, the two "arbitrators previously appointed by the parties hereto, shall proceed forthwith to arbitrate the controversies arising out of said agreements" (Cl. Tr. 46-50).

With Union Paving Co. expressly reserving its objection that it had been denied its right to trial by jury (Arb. Tr. Vol. I, pp. 1-2, 7-8; Vol. II, pp. 13-14); (Cl. Tr. 85, 87), the arbitration did proceed. And an award signed by McGilvray and Macomber was subsequently made and filed (Cl. Tr. 69-217).

On July 14, 1954, respondent Downer Corporation filed a motion for an order confirming the two-man award (Cl. Tr. 51-217). Union Paving Co. filed objections to the motion, together with a counter-motion for order vacating the award (Cl. Tr. 218-252). It specifically objected that it had been denied its statutory and constitutional right to a jury trial on the issue of default. But the trial court made an order confirming the award and denying Union Paving Company's Motion to Vacate.

Union Paving Co. appealed from this order, raising in both its Opening Brief (pp. 53-59) and Reply Brief (pp. 41-54) the contention that it had been denied its statutory and constitutional right to a jury trial. On December 14, 1956, the District Court of

Appeal, Third Appellate District, handed down its decision affirming the order of the Superior Court.

Union Paving Co. then filed a Petition for Rehearing, raising the jury trial point again (pp. 21-23), but the Petition for Rehearing was denied on January 3, 1957.

A petition for hearing by the California Supreme Court, likewise raising the jury trial point (pp. 2-3, 28-33), was denied on February 6, 1957.

Petitioner therefore has no further remedy for appellate review in the state courts of California, and the decision of the District Court of Appeal of the State of California is the decision of the highest court of the state in which a decision can be had.

ARGUMENT.

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE DISTRICT COURT OF APPEAL HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THE UNITED STATES SUPREME COURT AND IN A WAY NOT IN ACCORD WITH THE BASIC REQUIREMENTS OF DUE PROCESS.

The question here is whether it is inconsistent with basic concepts of ordered liberty for a trial court to deprive a party of the constitutional and statutory right to trial by jury on the issue of default under an arbitration agreement when the party properly pleads the issue and demands a jury trial thereon.

The question is colored by the fact that the trial court here conceded that at the very moment these

proceedings were commenced the parties had agreed to engage in and were in fact engaged in settlement negotiations rather than arbitration. The Court concluded, however, that the negotiations had become "operation deadlock" and required the intervention of an "impartial," court-appointed arbitrator. This despite the fact that Section 1282 of the California Code of Civil Procedure, in line with the California constitution, guarantees the responding party the right to be heard *by a jury* on the question of "deadlock" (i.e., his default) and Section 1283 of that code specifies that a Court shall not appoint an arbitrator unless the consent machinery provided for in the agreement has broken down.

Petitioner contends that to sanction such compulsory arbitration without permitting the very trial by jury that the California statute (and most other arbitration statutes) guarantees is to permit arbitrary and capricious judicial action in conflict with fundamental guarantees established for the protection of private rights.

No similar case raising this federal question has been found. Petitioner therefore respectfully seeks a hearing by the United States Supreme Court on this new and all important point.

II. THE DUE PROCESS CLAUSE EXACTS FROM THE STATES AND THEIR COURTS ALL THAT IS IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY. AND IT IS CLEAR THAT THIS CONCEPT PROTECTS AGAINST ARBITRARY AND CAPRICIOUS CONSTRUCTION OF A STATE STATUTE AND AGAINST COMPULSORY ARBITRATION.

Due process exacts from states and their courts all that is implicit in the concept of ordered liberty.

Palko v. Connecticut, 302 U.S. 319, 82 L. Ed. 288, 58 S. Ct. 149;

Wolf v. Colorado, 338 U.S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359;

Foster v. Illinois, 332 U.S. 134, 91 L. Ed. 1955, 67 S. Ct. 1716.

Moreover, in 12 *Am. Jur.,* Constitutional Law, Section 577, the text points out at page 274:

> "It seems clear that a violation of the due process clause may be committed by the state judiciary, at least in construing a state statute."

It is therefore true, as the Court points out in *Am. R. Ex. Co. v. Kentucky,* 273 U.S. 269, 71 L. Ed. 639, 47 S. Ct. 353, that the federal courts may review the "construction" of a state staute where the action of the state judiciary has been arbitrary and capricious. And it is equally true that the federal courts should, under the authority of the due process clause, prevent a "construction" that will result in compulsory arbitration.

Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 67 L. Ed. 1103, 43 S. Ct. 630;

Menzet v. Nashville Paper, Etc. Un., 221 F. 2d 644, 647.

III. IN PROTECTING THE RIGHT OF PARTIES TO ENTER ARBITRATION ONLY BY THEIR EXPRESS CONSENT, ARBITRATION STATUTES TYPICALLY ALLOW TRIAL BY JURY ON THE ISSUES OF THE MAKING OF THE ARBITRATION CONTRACT AND DEFAULT IN THE PERFORMANCE THEREOF. WHEN DEMANDED, SUCH JURY TRIAL THEN BECOMES A MATTER OF RIGHT.

As the court said in *Lew Morris Demolition Co. v. George F. Driscoll Co.*, 273 N. Y. 330, 7 N. E. 2d 252, 253:

> "No one is under a duty to resort to these conventional tribunals, however helpful their processes, except to the extent he has signified his willingness."

Arbitration statutes therefore typically provide for a hearing on the questions of (1) the making of the contract and (2) default in performance. And failure to grant such hearing has been declared to be a violation of due process.

Finsilver, Still & Nies v. Goldberg Maas & Co., 253 N. Y. 382, 171 N. E. 579;

Schafran & Finkel v. M. Lowenstein & Sons, 280 N. Y. 164, 19 N. E. 2d 1005;

Goldstein v. International Ladies G. Workers Union, 328 Pa. 384, 196 Atl. 43.

In California the rule is stated as follows in *Drake v. Stein*, 116 C. A. 2d 779, 784, 254 P. 2d 613:

> "It is only after a finding has been made that under a written contract of arbitration a party is in default in the performance thereof, that the Court will order the parties of the contract to proceed in accordance therewith."

Typically, these issues are left open to trial by jury and such jury trial must, if demanded, be accorded *as a matter of right.*

In re Gresham & Co., 202 App. Div. 211, 195 N.Y.S. 106;

Almacenes Fernandez v. Golodetz, 148 F. 2d 625 (2d Cir.);

Goldstein v. International Ladies G. Workers Union, 328 Pa. 384, 196 Atl. 43.

Thus, the Court says in *Katakura & Co. v. Vogue Silk Hosiery Co.,* 307 Pa. 544, 161 Atl. 529, 530:

> "If the defendant by its answer raises an issue as to the making of the arbitration agreement pleaded by the plaintiff or as to the failure, neglect, or refusal to perform the same, the court having jurisdiction shall proceed to the trial thereof, as provided in Section 3 of the Arbitration Act (5 P.S. § 1630). On these issues or any of them, the parties are entitled to a jury trial if it is not waived."

IV. PETITIONER CONTENDS THAT IT IS THEREFORE A VIOLATION OF DUE PROCESS FOR A COURT—ADMITTEDLY DETERMINED TO INTERVENE IN SETTLEMENT NEGOTIATIONS—TO DENY A RIGHT TO TRIAL BY JURY AND THUS DEPRIVE A LITIGANT OF THE OPPORTUNITY TO PROVE TO A JURY THAT NO DEFAULT JUSTIFYING COURT INTERVENTION HAS OCCURRED, WHEN THAT PRECISE RIGHT IS GUARANTEED BY STATE STATUTE.

We acknowledge that there are several decisions of this Court to the effect that the Fourteenth Amendment does not guarantee a jury trial *per se* in the state courts. But that is not the issue in this case.

In this case the right to trial by jury was guaranteed by the legislature in line with Constitutional guarantees, as a vital safeguard of private rights. The state judiciary chose to deprive petitioner of this vital procedural *right*. Under these circumstances, it is not alone the deprivation *per se* of a jury trial that raises the federal question, but also the arbitrary and capricious disregard by the state judiciary of an inviolable right given to petitioner by the legislature. And the deprivation is particularly offensive to fundamental concepts of justice and fair play when the end result is to compel resort to an arbitration tribunal in the face of state decisions making impossible any appellate review of the merits of an arbitrated controversy.

It is settled law in California that the merits of a controversy submitted to arbitration are not subject to judicial review.

Pacific Vegetable Oil Corp. v. C.S.T., Ltd., 29 Cal. 2d 228, 174 P. 2d 441;

Crofoot v. Blair Holding Corp., 119 Cal. App. 2d 156, 260 P. 2d 156.

It is therefore especially necessary that procedural safeguards against involuntary arbitration be observed.

In this case, Downer Corporation instituted proceedings seeking the very relief provided for in California Code of Civil Procedure Section 1282—an order directing that arbitration proceed in the manner

prescribed by the agreement. As an incident, Downer Corporation sought to have a "third" arbitrator appointed under authority of Section 1283 of the California Code of Civil Procedure.

Union Paving Company squarely raised the issue that no arbitration was in process; that the two "arbitrators" were in fact the attorneys of the parties and had been diretced to and were in fact negotiating toward settlement; and that there was no default under the agreement.

Under the California decisions, it is clear that "the default mentioned in Section 1282 of the Code of Civil Procedure refers to the failure to comply with the agreement to arbitrate."

Pneucrete Corp. v. U. S. Fid. & G. Co., 7 C. A. 2d 733, 741, 46 P. 2d 1000.

Thus Union Paving Company clearly invoked a defense available to it under the state statute, namely—that the original plan to arbitrate had been tabled, that there were no two arbitrators yet appointed, that there had been no demand for resumption of arbitration, and that there had therefore been no "failure to comply with the agreement to arbitrate."

The trial court felt that the settlement negotiations by two attorneys would inevitably be fruitless. It said such negotiations amounted to "operation deadlock." It forced acceptance of an "umpire" in these voluntary negotiations. And, however benign the court's objectives, its order compelled Union Paving Company to arbitrate without being accorded a hear-

ing by a jury on allegations which, if proved, would have rendered judicial action impossible.

The conclusion therefore seems inescapable that due process was violated. The legislature guaranteed that the arbitration machinery could not be invoked without a default, and a Court arbitrator could not be appointed except in the manner provided for in the agreement. It guaranteed all litigants the right to prove to a jury either 1) that there was no agreement, or 2) that the agreement was being performed.

For a court to deny a litigant these rights is a violation of fundamental principles of ordered liberty and fair play.

V. THE OPINION OF THE DISTRICT COURT OF APPEAL STATES THAT EVERY INTENDMENT IS IN FAVOR OF THE VALIDITY OF AN ARBITRATION AWARD. IT THEN PROCEEDS TO REVIEW THE EVIDENCE MOST FAVORABLE TO DOWNER CORPORATION ON THE ISSUE OF DEFAULT, AND CONCLUDES THAT THE TRIAL COURT'S FINDING IS AMPLY SUPPORTED. BUT THAT APPROACH IGNORES THE FACT THAT THE RIGHT TO JURY TRIAL IS DEPENDENT UPON THE PLEADINGS RAISED IN DEFENSE BY THE RESPONDING PARTY. PETITIONER CONTENDS THAT ITS RIGHT TO JURY TRIAL ON ISSUES RAISED CANNOT BE DEFEATED BY THE BACKWARDS PROCESS OF HEARING THE EVIDENCE, MAKING AN ADVERSE FINDING THEREON, AND THEN USING A RULE OF APPELLATE REVIEW TO SUPPORT THE ADVERSE FINDING AND THEREBY REJECTING THE ADMITTED CONTENTION THAT THERE WAS NO DEFAULT.

Strangely enough, the *District Court of Appeal concedes that Union Paving Company raised the issue that no arbitration was in process and no default had occurred.* The opinion states:

> "It is contended by Union that immediately following the appointment of the two arbitrators the contemplated arbitration was abandoned in favor of the conduct of negotiations for the settlement by the lawyer-arbitrators on behalf of their respective clients."

And see excerpts of Union Paving Company's Answer, quoted in Appendix B of this petition.

The error of the opinion is that it then proceeds to review the *evidence* on default in the light most favorable to Downer Corporation. Such approach was proper under California law insofar as Union Paving Company challenged the sufficiency of the evidence to support the trial court's order compelling arbitration. But it was wholly at variance with statutory requirements as to jury trial on the *issue* of default.

The District Court of Appeal states that since arbitration had already commenced, the safeguards of Section 1282 did not apply. But this ignores the *allegations* by Union Paving Company that while arbitration machinery had *once* been put in motion, it had *subsequently*—by agreement of the parties—been *deferred and tabled.*

Again, therefore, we point out that it is the *pleadings—the raising of the issue*—which the California Legislature guaranteed would be determinative of the right to jury trial.

Surely a decision cannot be allowed to stand which accepts the contention of the moving party, rejects

the pleadings of the responding party and ignores the provisions of the law which provide that the right to a jury trial shall depend upon the issues raised by the responding party's *pleadings*.

CONCLUSION.

For the reasons stated above, petitioner Union Paving Company respectfully requests that a petition for certiorari be granted and directed to the District Court of Appeal of the State of California, Third Appellate District, to review its decision of December 11, 1956.

Dated, San Francisco, California,
April 29, 1957.

Respectfully submitted,
HENRY C. CLAUSEN,
Counsel for Petitioner.

(Appendices A and B Follow.)

Appendix A

In the District Court of Appeal
State of California
Third Appellate District

3 Civil No. 8800

In the Matter of the Application of
Downer Corporation,
a California Corporation,
for an Order Directing Arbitrators
to proceed and for the appointment
of a Third Arbitrator.

Downer Corporation,
Petitioner and Respondent,
vs.
Union Paving Company,
Respondent and Appellant.

Opinion

This is an appeal from an order confirming an award of arbitrators and from the judgment entered thereon.

On August 2, 1948, the parties entered into two written joint venture agreements, referred to as the Hagginwood and Contra Costa jobs, respectively.

Each contract provided that respondent-appellant Union Paving Company, referred to herein as Union, would furnish the capital; that petitioner-respondent Downer Corporation, referred to herein as Downer, would furnish the machinery, equipment and labor necessary for the performance of two construction contracts which had been awarded to Downer; and that profits or losses would be borne equally by the parties. Both contracts were successful. The Hagginwood job showed a net profit of over $170,000 and the Contra Costa job netted more than $47,000 or an overall total net profit in excess of $217,000, all of which was represented by 6 per cent sanitary district bonds. The bonds from the Contra Costa job bore interest from January 1, 1950 and those from the Hagginwood job from May 1, 1950. On May 8, 1951, the bonds were delivered to Mr. Dowling, president of Union, who converted them to his own use and refused to remit any of the proceeds to Downer.

Downer placed the matter in the hands of its attorney, Mr. Macomber, who unsuccessfully carried on settlement negotiations for approximately six months with Mr. Dowling. Mr. Macomber then advised Union that Downer had appointed him its arbitrator pursuant to the provisions contained in the joint venture agreements ". . . to the end that the said arbitrators shall appoint a third and the said matter shall proceed to arbitration." Thereafter, by a telegram dated December 18, 1951, Mr. Clausen, attorney for Union, advised Mr. Macomber that he had been designated by that corporation as its arbitrator, but nearly

three months elapsed before he was available for a meeting with Mr. Macomber. It then appeared that Mr. Clausen had not talked with Mr. Dowling and knew nothing concerning the matter. Also at that meeting Mr. Dowling stated that he was busy and did not know when he would get around to going over Downer's specifications of objections to the accounting of the joint ventures.

It is contended by Union that immediately following the appointment of the two arbitrators the contemplated arbitration was abandoned in favor of the conduct of negotiations for the settlement by the lawyer-arbitrators on behalf of their respective clients. However, on March 13, 1952, Downer filed petitions seeking an order appointing a third arbitrator and directing arbitration under each contract. Union demurred and moved to strike on the grounds that the court had no jurisdiction; that the California arbitration statutes were not applicable; that there was another action pending; and that Downer had waived its right to arbitration. At the time of the hearing Union filed an answer and return in which it alleged that it had not failed to name an arbitrator nor that the one appointed had been unable to agree with Downer's arbitrator on the appointment of a third, and that Downer was not aggrieved by such failure. Additionally it was alleged that the arbitration clause in the contracts called for common law arbitration, and hence the court had no power to compel the same. Union further alleged that it had not refused to cooperate in naming a third, that the arbitrators could

settle the matter between them without the necessity of a third, that in any event Downer had waived its right to arbitration, and concluded its answer with a demand for a jury trial. The contentions of Union were denied, and the Court appointed Mr. Kenneth G. McGilvray, an attorney of Sacramento, to act as the third arbitrator.

Thereafter the arbitrators met, went over the evidence and chose Mr. McGilvray to prepare the proposed findings and award. Several hearings were had during the following year, and the matter was eventually submitted for decision on October 9, 1953. Mr. McGilvray completed his work on June 2, 1954, and shortly thereafter sent the transcripts and exhibits to Mr. Clausen with the suggestion that they meet with Mr. Macomber during the week of July 5 to make the final award. Mr. Clausen did not answer that communication. On July 7 Mr. McGilvray wrote to him and to Mr. Macomber setting a meeting at the latter's office in Stockton for July 14. On July 9 Mr. Clausen replied that such time was unsatisfactory; that he had had no opportunity to review the evidence and the proposed award; and that he was preparing for a jury trial and would suggest a meeting in his San Francisco office on August 17. He also noted in his letter that he would object to any meeting of the arbitrators unless all three were present. Thereafter, on July 12, Mr. McGilvray again addressed a letter to Mr. Clausen stating that in view of the fact that the matter had been submitted on October 9, 1953, and that the proposed award together with all exhib-

its had been in Mr. Clausen's hands for more than a month, he proposed to meet with Mr. Macomber in his office on July 14 and sign the award. Mr. McGilvray and Mr. Macomber met on July 14, modified the award to a degree and signed the same as modified. On that same day Downer filed in the superior court of San Joaquin County a notice of motion for an order confirming the award. Union thereupon filed objections to the motion for an order confirming the award and moved for an order vacating the same and also moved for an order staying the proceedings to enforce the order. After a hearing at which evidence was introduced and briefs filed, the Court denied both motions by Union and confirmed the award.

The first source of disagreement relates to the arbitration clause contained in each of the joint venture agreements, which is as follows:

"If any question should arise concerning the interpretation of this Agreement or any matter arising therefrom, said question or matter shall be left to the determination of a Board of Arbitrators. Each party shall appoint one arbitrator and these two shall appoint a third arbitrator. *The decision of any two arbitrators shall be binding upon both parties* hereto, and *the cost of arbitration shall be borne equally between both parties."* (Emphasis added).

It is Union's contention that the court lacked jurisdiction to order the appointment of a third arbitrator or to direct the arbitrators to proceed, since the joint venture agreements did not contemplate statutory arbitration. In support of such contention it is ar-

gued that the first phrase of the quoted provisions negates any thought that the parties had in mind statutory arbitration, and that therefore the Court lacked jurisdiction to entertain the proceeding.

It should be noted that it is now well established ". . . by the adoption of the 1927 statute, the Legislature intended to adopt a comprehensive all-inclusive statutory scheme applicable to all written agreements to arbitrate, and that in such cases the doctrines applicable to a common law arbitration were abolished." (*Crofoot v. Blair Holdings Corp.*, 119 Cal.App.2d 156 [260 P.2d 156].) This same question was discussed in 38 California Law Review 799. The author notes that while the common law may be applicable to oral contracts, he suggests that it is not applicable to agreements in writing. The writer further states that no special language is required but that the arbitration clause should provide that parties agree to accept the award as final and binding. "It is reasonable that parties who voluntarily agree in writing to arbitrate should be bound by the statute and should not as an afterthought be permitted to escape from their contract through the portals of the common law." (38 Cal.L.Rev., p. 809). Thus, in *Snyder v. Superior Court*, 24 Cal.App.2d 263 [74 P.2d 782], it was agreed that in the event of a dispute between the parties, such dispute would be submitted to a named arbitrator "for determination." This court there held that to submit a dispute for determination is a tacit agreement to abide by that agreement. For as was there noted, there would be no reason to submit the dispute

to an arbitrator other than for determination. Hence it necessarily follows that while the paragraph in question could probably have been drafted with more precision, there can be little question but that as the trial court found, the words "any matter arising therefrom" relate back to the word "Agreement," and that thereby the arbitrators were authorized to decide any question concerning the joint venture agreements or arising therefrom, as well as the interpretation of the agreements and that by the words, "the decision of any two arbitrators shall be binding upon both parties," the parties agreed to accept the award as final and binding on them. In this regard the Court specifically found that in using the quoted phrases, it was the intent of the parties that any dispute arising under the agreements should be determined by arbitration, and that all of the matters and disputes which were submitted to and determined by the board of arbitrators arose out of said agreements and the performance thereof. In support of such findings the record shows that both parties submitted to the arbitrators exhaustive specifications of its claims against the other. These claims, for the most part, dealt with what were and what were not proper charges against the joint ventures. In this regard the trial court further noted that to arrive at a proper determination of such charges, including interest, it was necessary to interpret the agreements in light of the claims presented.

It is Union's next contention that the arbitration provisions heretofore quoted are so indefinite and un-

certain that they are incapable of specific performance. Its argument in this regard is but a restatement of its arguments in support of its first contention. It follows that what we have said before is likewise determinative of this contention.

Union next contends that the trial court erred in denying its demand for a jury trial pursuant to the provisions of section 1282 of the Code of Civil Procedure, since it had placed in issue the question of whether or not it was in default in failing to arbitrate. The pertinent portion of that section provides as follows:

"A party aggrieved by the failure, neglect or refusal of another to perform under an agreement in writing providing for arbitration may petition any superior court of the county or city and county where either party resides, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of the hearing of such application shall be served personally upon the party in default. The Court shall hear the parties, and upon being satisfied that the making of the agreement or such failure to comply therewith is not in issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the agreement or the default be in issue an order shall be made directing a summary trial thereof. Where such an issue is raised, the party alleged to be in default, may, on or before the return day of the notice of application, demand a jury trial of such issue, and if such demand

be made, said Court shall make an order referring the issue or issues to a jury called and impaneled in the manner provided for the trial of actions at law . . ."

In answer to the contention so made, Downer argues that section 1282 is not controlling in that its petition alleged the completion of the work contemplated by the joint venture agreements, the submission of conflicting claims by both parties, Downer's demand that Union proceed to arbitrate, the appointment by each party of an arbitrator, the inability of the two arbitrators so appointed to agree upon the matters to be arbitrated, their inability to agree upon a third arbitrator, and the request that the court appoint a third arbitrator as provided in section 1283 of the Code of Civil Procedure. That section reads in part as follows:

". . . . [I]f a method be provided and any party thereto shall fail to avail himself of such method, or for any reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, or in the failure or refusal of any arbitrator or arbitrators or umpire to attend or fulfill his or their duties, then, upon application by either party to the controversy, the court mentioned in section 1282 of this code shall designate and appoint an arbitrator or arbitrators, or umpire, as the case may require . . ."

From an examination of the pertinent portions of the two sections, it appears that section 1282 relates

to and concerns only the acts of the parties prior to the commencement of the arbitration proceedings. If, however, as here, arbitration proceedings have been commenced and there has been a failure to appoint a third arbitrator, then the provisions of 1283 apply. Here the trial court was cognizant of the difference in the situations contemplated by the two sections when at the conclusion of the hearing upon plaintiff's petition it observed, "The petition contains certain allegations within the provisions of Section 1283. There are other matters alleged in the reply. My view of the issues raised in the reply is that the grounds therein stated do not simply on the face raise any issues under the provisions of Section 1282, the Section that gives a right to a trial by jury. 'The making of the agreement' is not an issue. 'The failure to comply therewith.' The only failure to comply therewith that I can find in the pleadings and under the evidence is the failure to name the third arbitrator, an issue under Section 1283."

We are in complete agreement with that statement. Neither Union nor Downer was in default since each had already appointed its arbitrator, and the two so appointed had commenced their arbitration pursuant to the agreement. Hence the only issue which was before the Court was that there had been a failure to agree upon the third arbitrator. It follows that Union's demand for a jury trial was quite properly refused by the trial court.

Union next contends that the award must be vacated since the arbitrators exceeded their powers in

determining claims as to breach of other contracts and in awarding interest and fixing their own fees. The essence of the argument in support of this contention by Union's counsel is but a restatement of his argument in support of his first contention; that is, the meaning of the arbitration paragraph. If, as we held in regard to that question, the arbitrators were authorized to determine any matter arising out of the joint venture agreements, then it would necessarily follow that they quite properly considered the interest due Downer, since Union held all of the bonds from the issuance thereof, and the costs and expenses of the arbitration and fees of the arbitrators were necessarily a part of the duties contemplated by the arbitration provision.

Union further contends that the arbitrators were guilty of misconduct in refusing to postpone the meeting of July 14 at which the award was signed by Mr. Macomber and Mr. McGilvray in the absence of Mr. Clausen. However, as Downer points out, the meeting on July 14 was not a hearing as contemplated by subsection (c) of section 1288, Code of Civil Procedure, but a meeting to execute the formal award.

Finally, Union attacks the sufficiency of the evidence and charges miscalculation of the arbitrators. However, it is the rule that,

". . . [T]he superior court upon motion to confirm, and this court on appeal, has no power to review the sufficiency of the evidence to sustain the award, and in fact the evidence produced before the arbitra-

tor is not even made a part of the record on appeal. Under the 1927 statute, it is well settled that both before the superior and appellate courts every intendment of validity must be given the award and that the burden is upon the one claiming error to support his contention . . . It has been held that the arbitrator need not make findings or give reasons for his conclusions . . . Certainly it is settled that the courts have no power to review the sufficiency of the evidence. [Citations.] The law is not quite so clear as to a court's power of review over questions of law. The earlier cases held that the court had the power to review errors of law, at least where they appeared upon the face of the award. [Citations]. The later cases have gone much farther in granting finality to the award even as to questions of law. In *Pacific Vegetable Oil Corp. v. C.S.T., Ltd.*, 29 Cal.2d 228, 233 [174 P.2d 441], it was bluntly held that 'The merits of the controversy between the parties are not subject to judicial review.' . . . 'Arbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action.' [Citing cases]. . . .

"Under these cases it must be held that in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute." (*Crofoot v. Blair Holdings. Corp., supra,* 119 Cal.App.2d 156, 185-186).

Therefore since every intendment is in favor of the validity of the award, the burden is upon the one claiming error to sustain his contention. Under the facts and circumstances disclosed by the record before this court, it cannot be said that Union has sustained the burden so cast upon it.

The order and judgment are affirmed.

Peek, J.

Van Dyke, P. J., and McMurray, J. pro tem.,* concurred.

Filed December 11, 1956.

L. A. Endres, Clerk.

*Assigned by Chairman of Judicial Council.

Appendix B

Following are portions of the answer filed by Union Paving Company and raising the issue of default (Cl. Tr. 26-28).

"In connection with the foregoing, respondent alleges that in pursuance of said arbitration clause it had selected in December, 1951, Henry C. Clausen, Esq., of San Francisco, California, as its arbitrator, and that since said time the said Clausen and the said arbitrator of petitioner, Forrest E. Macomber, had negotiated and were negotiating concerning steps looking toward a settlement of any differences of the parties, rather than proceeding with the arbitration as contemplated by said arbitration clause, and without the necessity of naming a third arbitrator; that said Macomber and Clausen were attorneys for their respective clients, the parties hereto; that in pursuance of said steps looking toward settlement, and said understanding, the said Macomber and Clausen negotiated, exchanged correspondence and conferred regularly from their appointment and down to the day process in the proceeding above was served on respondent and on said very day, proceedings then were under way looking toward said settlement voluntarily and without recourse to said arbitration proceedings; that at no time did respondent ever refuse to name or did Clausen refuse to cooperate in naming any third arbitrator, nor were the steps to determine whether said Macomber and Clausen could amicably

arrange for adjustment of any differences ever abandoned; that on the very day when process above was served on respondent said Macomber and Clausen, by conference in San Francisco, had agreed on the categories of questions involved, the methods by which some of these might be resolved, including litigation pending in the Counties of Contra Costa and Kern, California.

* * * * * * *

. . . in reliance upon the understanding that steps were being taken for settlement of the questions, without recourse to arbitration, arrangements were made for the employment of said Macomber and Clausen as counsel for the parties hereto, which never would have been done had there been any question but that said settlement steps would continue and that no attempts would be made for Court compulsion of said arbitration clause; that in pursuance of said settlement steps, the petitioner and respondent had paid one Kennedy, an accountant, to do certain accounting work in connection with the settlements of the accounts of the parties, and said accounting services were in progress at the very time process above was served.

* * * * * * *

. . . that in any event respondent was not and is not in default thereof, and that no Court compulsion or enforcement of any kind was or is necessary; and that the appointment of a third arbitrator and the further conduct of arbitration proceedings was by consent of the parties deferred . . ."

Subject Index

	Page
Additional statutory provision involved	1
Statement of the case	2
Argument	6
I. The petitioner has failed to properly present the alleged federal question to the California Supreme Court, and this court has, therefore, no jurisdiction to review the decision of the state court	6
II. Petitioner has failed to cite authorities holding that this court has jurisdiction to review or that this court will review the action of a state court in determining the right to a jury trial where local law is applicable	8
III. There has been no arbitrary or capricious construction of a state statute by the California courts in the instant case	10
IV. No issue with respect to the making of the contract or the default in performance was framed by the pleadings herein	11
Conclusion	12

Table of Authorities Cited

Cases	Pages
Am. R. Ex. Co. v. Kentucky, 273 U.S. 269, 71 L. Ed. 639, 47 S. Ct. 353	10
Central Union Telephone Company v. City of Edwardsville, 269 U.S. 190, 70 L. Ed. 187	7
Coates v. Lawrence, 46 Fed. Supp. 414	8
Edelman v. California, 344 U.S. 357, 358, 97 L. Ed. 387	7
Honeyman v. Hanan, 300 U.S. 14, 81 L. Ed. 471	6
Hulbert v. City of Chicago, 202 U.S. 275, 50 L. Ed. 1026	7
John v. Paullin, 231 U.S. 583, 58 L. Ed. 381	7
Konigsberg v. The State Bar of California, No. 5—October Term, 1956, decided May 6, 1957	6
Lynch v. New York, 293 U.S. 52, 79 L. Ed. 191	6
McDonald v. Oregon, etc., Nav. Co., 233 U.S. 665, 58 L. Ed. 1145	8
Mutual Life Ins. Co. of New York v. McGrew, 188 U.S. 291, 47 L. Ed. 480	7
New Jersey Chiropractic Assoc. v. State Board, 79 Fed. Supp. 327	8
Southern R. Co. v. Durham, 266 U.S. 178, 69 L. Ed. 231	8
Southwestern Bell Telegraph Co. v. Oklahoma, 303 U.S. 206, 82 L. Ed. 751	6
Wagner Electric Mfg. Co. v. Lyndon, 262 U.S. 226, 232, 67 L. Ed. 961	8
Walker v. Sauvinet, 92 U.S. 90, 23 L. Ed. 678	8
Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 67 L. Ed. 1103, 43 S. Ct. 630	10

Statutes	
California Code of Civil Procedure:	
Section 1282	5, 10
Section 1283	5, 10, 11
Section 1285	5, 10

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 974

UNION PAVING CO., a corporation,
Petitioner,
vs.
DOWNER CORPORATION, a corporation,
Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the United States.

ADDITIONAL STATUTORY PROVISION INVOLVED.

There is an additional State statute involved, and that is Section 1285 of the Code of Civil Procedure, which reads as follows:

"§1285. Summary hearings

Any application made under the authority of this act shall be heard in a summary way in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided. (Enacted 1872. As amended Stats. 1927, c. 225, p. 405 § 6.)"

STATEMENT OF THE CASE.

In this matter the trial court and Appellate Court dealt with two (2) aspects of the controversy between the parties.

The first aspect dealt with is this: Each party had appointed its own arbitrator under arbitration provisions in two (2) separate contracts, and after nearly three (3) months had elapsed after each party to the contracts had appointed an arbitrator and it appeared that they would not be able to agree upon a third arbitrator, Downer petitioned the trial court to appoint a third arbitrator under the provisions of Section 1283 of the Code of Civil Procedure. The trial court did appoint Kenneth G. McGilvray, an Attorney of Sacramento, as the third arbitrator, and after the arbitration was had and an award made, the trial court then dealt with the second aspect of the case, which was to confirm the award of the arbitrators. Petitioner's complaint in this Court has to do with the fact that the trial court denied Petitioner a jury trial in the first proceeding mentioned and the District Court of Appeal affirmed the trial court on appeal.

The factual background is succinctly stated in the Opinion of the District Court of Appeal, and for the convenience of this Court we will set forth here such portions thereof as pertain to the matter before this Court.

> Opinion of District Court of Appeal, Appendix A, Petition for a Writ of Certiorari, Page ii:
>
> "Downer placed the matter in the hands of its attorney, Mr. Macomber, who unsuccessfully car-

ried on settlement negotiations for approximately six months with Mr. Dowling. Mr. Macomber then advised Union that Downer had appointed him its arbitrator pursuant to the provisions contained in the joint venture agreements '. . . to the end that the said arbitrators shall appoint a third and the said matter shall proceed to arbitration.' Thereafter, by a telegram dated December 18, 1951, Mr. Clausen, attorney for Union, advised Mr. Macomber that he had been designated by that corporation as its arbitrator, but nearly three months elapsed before he was available for a meeting with Mr. Macomber. It then appeared that Mr. Clausen had not talked with Mr. Dowling and knew nothing concerning the matter. Also at that meeting Mr. Dowling stated that he was busy and did not know when he would get around to going over Downer's specifications of objections to the accounting of the joint ventures.

It is contended by Union that immediately following the appointment of the two arbitrators the contemplated arbitration was abandoned in favor of the conduct of negotiations for the settlement by the lawyer-arbitrators on behalf of their respective clients. However, on March 13, 1952, Downer filed petitions seeking an order appointing a third arbitrator and directing arbitration under each contract. Union demurred and moved to strike on the grounds that the court had no jurisdiction; that the California arbitration statutes were not applicable; that there was another action pending; and that Downer had waived its right to arbitration. At the time of the hearing Union filed an answer and return in which it alleged that it had not failed to name an arbitra-

tor nor that the one appointed had been unable to agree with Downer's arbitrator on the appointment of a third, and that Downer was not aggrieved by such failure. Additionally it was alleged that the arbitration clause in the contracts called for common law arbitration, and hence the court had no power to compel the same. Union further alleged that it had not refused to cooperate in naming a third, that the arbitrators could settle the matter between them without the necessity of a third, that in any event Downer had waived its right to arbitration, and concluded its answer with a demand for a jury trial. The contentions of Union were denied, and the Court appointed Mr. Kenneth G. McGilvray, an attorney of Sacramento, to act as the third arbitrator."

* * *

Page viii:

"Union next contends that the trial court erred in denying its demand for a jury trial pursuant to the provisions of section 1282 of the Code of Civil Procedure, since it had placed in issue the question of whether or not it was in default in failing to arbitrate."

* * *

Page ix:

"In answer to the contention so made, Downer argues that section 1282 is not controlling in that its petition alleged the completion of the work contemplated by the joint venture agreements, the submission of conflicting claims by both parties, Downer's demand that Union proceed to arbitrate, the appointment by each party of an arbitrator, the inability of the two arbitrators so appointed to agree upon the matters to be ar-

bitrated, their inability to agree upon a third arbitrator, and the request that the court appoint a third arbitrator as provided in section 1283 of the Code of Civil Procedure."

* * *

Page ix:

"From an examination of the pertinent portions of the two sections, it appears that section 1282 relates to and concerns only the acts of the parties prior to the commencement of the arbitration proceedings. If, however, as here, arbitration proceedings have been commenced and there has been a failure to appoint a third arbitrator, then the provisions of 1283 apply. Here the trial court was cognizant of the difference in the situations contemplated by the two sections when at the conclusion of the hearing upon plaintiff's petition it observed, 'The petition contains certain allegations within the provisions of Section 1283. There are other matters alleged in the reply. My view of the issues raised in the reply is that the grounds therein stated do not simply on the face raise any issues under the provisions of Section 1282, the Section that gives a right to a trial by jury. "The making of the agreement" is not an issue. "The failure to comply therewith." The only failure to comply therewith that I can find in the pleadings and under the evidence is the failure to name the third arbitrator, an issue under Section 1283.'*

"We are in complete agreement with that statement. Neither Union nor Downer was in default

*Section 1285 of the Code of Civil Procedure specifically denied a jury trial in a proceeding under Section 1283. A jury trial was permitted only under Section 1282.

since each had already appointed its arbitrator, and the two so appointed had commenced their arbitration pursuant to the agreement. Hence the only issue which was before the Court was that there had been a failure to agree upon the third arbitrator. It follows that Union's demand for a jury trial was quite properly refused by the trial court."

ARGUMENT.

I. THE PETITIONER HAS FAILED TO PROPERLY PRESENT THE ALLEGED FEDERAL QUESTION TO THE CALIFORNIA SUPREME COURT, AND THIS COURT HAS, THEREFORE, NO JURISDICTION TO REVIEW THE DECISION OF THE STATE COURT.

This Court has repeatedly held that it has no jurisdiction to review the decision of a State court unless the petitioner has affirmatively shown that the Federal claim or question was properly presented to the highest court of the State having jurisdiction.

Lynch v. New York, 293 U.S. 52, 79 L. Ed. 191;

Honeyman v. Hanan, 300 U. S. 14, 81 L. Ed. 471;

Southwestern Bell Telegraph Co. v. Oklahoma, 303 U. S. 206, 82 L. Ed. 751;

Konigsberg v. The State Bar of California, No. 5 — October Term, 1956 decided May 6, 1957.

In order for a question to have been properly presented to the highest court of the State, it must have been presented and preserved in the manner pre-

scribed by the appellate practice of the State. If this was not done, this Court has no jurisdiction.

Edelman v. California, 344 U. S. 357, 358, 97 L. Ed. 387;

John v. Paullin, 231 U. S. 583, 58 L. Ed. 381;

Central Union Telephone Company v. City of Edwardsville, 269 U. S. 190, 70 L. Ed. 187;

Hulbert v City of Chicago, 202 U. S. 275, 50 L. Ed. 1026;

Mutual Life Ins. Co. of New York v. McGrew, 188 U. S. 291, 47 L. Ed. 480.

Nowhere in Petitioner's Petition for a Hearing before the California Supreme Court is the Fourteenth Amendment of the United States Constitution mentioned, nor does it purport to argue that it was denied due process of law pursuant to said Amendment.

Since Petitioner's Petition for Hearing before the California Supreme Court contains no argument on the Constitutional issue and no citation of supporting authorities, it has failed to meet the State requirements in presenting the Constitutional issue to the California Supreme Court, and this Court, therefore, has no jurisdiction, as noted by the above authorities.

II. PETITIONER HAS FAILED TO CITE AUTHORITIES HOLDING THAT THIS COURT HAS JURISDICTION TO REVIEW OR THAT THIS COURT WILL REVIEW THE ACTION OF A STATE COURT IN DETERMINING THE RIGHT TO A JURY TRIAL WHERE LOCAL LAW IS APPLICABLE.

The sole issue raised by Petitioner is with respect to the right to a jury trial under the California arbitration statutes — Sections 1280 to 1293 of the California Code of Civil Procedure. Petition for Writ of Certiorari, Page 10. No authority is cited to establish the jurisdiction of this Court or to support its claim that this Court is concerned with the action of the California Courts in determining the right to a trial by jury under the California arbitration statutes. The authorities are, however, numerous and uniform to the effect that this Court is not concerned with determining whether the due process clause of the Fourteenth Amendment has been violated by State Court.

In:

McDonald v. Oregon, etc., Nav. Co., 233 U. S. 665, 58 L. Ed. 1145;

the Court states:

> "It is elementary and needs no citation of authorities to show that due process clause of the Fourteenth Amendment does not control methods of state procedure or give jurisdiction to this Court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-federal in character."

When the parties have been fully heard in the regular course of judicial proceedings, as they most cer-

tainly have been in this case, an erroneous decision of a State court, if in fact it be erroneous, does not deprive the unsuccessful party of his property without due process of law.

Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678.

The right of a jury trial in a State court is determined by the local law, concerning which this Court accepts the decision of the highest State court.

Southern R. Co. v. Durham, 266 U. S. 178, 69 L. Ed. 231.

The Fourteenth Amendment neither implies that all trials must be by jury nor guarantees any particular form or method of State procedure.

Coates v. Lawrence, 46 Fed. Supp. 414.

Deprivation of a right of trial by jury in a State court does not deny the parties due process of law under the Federal Constitution.

Wagner Electric Mfg. Co. v. Lyndon, 262 U. S. 226, 232, 67 L. Ed. 961.

See, also:

New Jersey Chiropractic Assn. v. State Board, 79 Fed. Supp. 327,

holding that trial by jury may be modified by a State or abolished altogether.

The Court is, therefore, not concerned with the action of the State Courts in determining that the California arbitration statutes are clear in not granting a trial by jury in situations such as those involved in this case.

III. THERE HAS BEEN NO ARBITRARY OR CAPRICIOUS CONSTRUCTION OF A STATE STATUTE BY THE CALIFORNIA COURTS IN THE INSTANT CASE.

As heretofore noted, California Code of Civil Procedure Section 1285 provides that any application made under the arbitration sections shall be heard in a summary way in the manner provided by law for the making and hearing of motions except as may be otherwise expressly provided in the sections. Section 1282 of the California Code of Civil Procedure authorizes trial by jury in certain situations. As also noted previously, the trial court found that Sections 1282 of the California Code of Civil Procedure was not applicable because neither the making of the agreement nor the default were in issue, and that Section 1283 of the California Code of Civil Procedure applied and that, therefore, no trial by jury was authorized. The Appellate Courts affirmed the decision of the trial court, as noted by the considered Opinion of the District Court of Appeal. Even if this decision were erroneous, it would not deprive the unsuccessful party of property without due process of law.

Am. R. Ex. Co. v. Kentucky, 273 U. S. 269, 71 L. Ed. 639, 47 S. Ct. 353.

The construction by the State court of the State statute is controlling.

Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. Ed. 1103, 43 S. Ct. 630.

IV. NO ISSUE WITH RESPECT TO THE MAKING OF THE CONTRACT OR THE DEFAULT IN PERFORMANCE WAS FRAMED BY THE PLEADINGS HEREIN.

As noted previously, the trial court found that there was no issue tendered by the pleadings with respect to the making of the contract or default in performance. The Court noted that the only issue was the failure of the two arbitrators appointed by the respective parties to agree on a third arbitrator. The California Code of Civil Procedure Section 1283 provides the procedure for naming a third arbitrator where two fail to agree or where there has been a lapse of time in the naming of the third arbitrator, and such a proceeding does not embrace the right to a trial by a jury.

The trial court and the Appellate Courts were presented with the same argument now raised with respect to the issues raised by the pleadings, and the resulting right to trial by jury if an issue was raised under Section 1282 of the California Code of Civil Procedure, and it has been determined in the considered Opinions of those Courts that no such issue was raised and that, therefore, there was no provision of the California arbitration statutes which authorized a trial by jury, in view of the provisions of Section 1285 of the California Code of Civil Procedure relating to summary hearings in arbitration proceedings.

CONCLUSION.

It is respectfully submitted, therefore, that the Petition of the Union Paving Co. for Certiorari should be denied for the reason that this Court has no jurisdiction to review the decision of the State Court by reason of the failure of Petitioner to present the Federal question, if any, to the California Supreme Court, and, further, because of the settled law and uniform decisions with respect to the right to review by this Court of the actions of a State court in denying a jury trial under State law.

The Petitioner has been afforded a full and complete review of the actions of the trial court by the Appellate Courts of California.

Dated, Stockton, California,
May 14, 1957.

Respectfully submitted,
FORREST E. MACOMBER,
Counsel for Respondent.

GORDON J. AULIK,
Of Counsel.